

ANALYSIS OF THE 2011 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW

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Several amendments to the Delaware General Corporation Law (the “DGCL”) took effect on August 1, 2011. They are mostly technical in nature. The amendments (i) made minor changes to the provisions on corporate names; (ii) enacted minor changes to the information that must be on file with the Delaware Secretary of State about a corporation’s registered office in Delaware; (iii) clarified how a recently enacted “vested rights” provision operates when a corporation grants indemnification or advancement rights to directors, officers, employees and agents; (iv) clarified the filing requirements necessary for an entity to convert into or domesticate as a Delaware corporation; (v) clarified certain Delaware franchise tax requirements that must be satisfied to effect a corporation’s dissolution or merger, or a conversion of a Delaware corporation to another form of legal entity or transfer to another jurisdiction; (vi) effected changes to the provisions on trust corporations; and (vii) clarified that certain captive insurance companies and certain charitable, religious and educational corporations are exempt from paying Delaware franchise taxes.¹

FORMATION

Contents of certificate of incorporation [§ 102].—The amendments to Section 102 enacted minor changes regarding corporate names and the information that must be on file in Delaware about a corporation’s registered office in Delaware.

Section 102(a)(1) requires that the name of a corporation include a word or abbreviation that denotes the entity’s corporate status (e.g., “Corp.,” “Inc.,” “Ltd.” etc.). Section 102(a)(1) was amended to authorize the Delaware Secretary of State’s office (through its Division of Corporations) to waive this “corporate identifier” requirement (so that the corporation does not need to include one of these words or abbreviations in its name) for any “nonprofit nonstock” corporation that is an association of professionals.² Before this amendment, the Delaware Secretary of State could waive this corporate identifier requirement only for corporations that have total assets of \$10 million or more. The new waiver provision vests the Delaware Secretary of State’s office with the sole discretion to determine whether to grant the waiver to the nonprofit nonstock

1. This article supplements prior reports published by Aspen Publishers and its predecessor, Prentice Hall Law & Business, describing amendments to the Delaware General Corporation Law enacted in each of calendar years 1967; 1969; 1970; 1973-74; 1976; 1981; 1983-1988; and 1990-2010. The authors of one or more of the prior reports are: S. Samuel Arsht; Walter K. Stapleton; Lewis S. Black, Jr.; A. Gilchrist Sparks, III; Frederick H. Alexander; Jeffrey R. Wolters; and James D. Honaker.

2. The new provision does not define “professionals.” The term “professional” is used in Chapter 6 of the DGCL, which contains special provisions for corporations organized to provide licensed, professional services in Delaware. However, the term professionals in Section 102(a)(1) should not be interpreted by reference to the special provisions of Chapter 6, which include their own provisions for names of professional service corporations.

The term “nonprofit nonstock corporation” is defined in Section 114(d)(3).

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CORPORATION

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corporation, and, like the pre-existing provision for corporations with gross assets at or above \$10 million, specifies that a waiver cannot be granted if the Delaware Secretary of State's office determines that the corporation's name is, or appears to be, the name of a natural person.

Section 102(a)(1) was also amended to specify that a corporation cannot use the word "trust" in its name unless it is permitted to do so by Section 395. (Section 395 is discussed below.) This amendment essentially cross-references the restrictions that had already been imposed by Section 395.

Section 102(a)(2) requires a corporation to include in its certificate of incorporation the address of its registered office in Delaware. A corporation's registered office in Delaware is required to accept service of process of certain documents and perform other administrative tasks for the corporation. Before the amendments, Section 102(a)(2) specified what information needed to be included about the mailing address of the registered office. The amendments moved to a new Section 131(c) the list of information that a corporation needs to include in the certificate of incorporation about its registered office; amended Section 102(a)(2) cross-references this new Section 131(c).

REGISTERED AGENT

Registered office in State; principal office or place of business [§ 131].—A new Section 131(c) specifies that the address of a corporation's registered office listed in its certificate of incorporation must include the street, number, city, county and postal code of the registered office. Disclosure of the postal code is the only new requirement added by the amendments. Practitioners should note that Section 131(c) carries forward the requirement to disclose the county in which the registered office resides; this requirement is sometimes overlooked by certificate of incorporation filers. Through a string of related cross-references in Sections 502(a)(1), 102(a)(2) and 131(c), annual franchise tax reports filed with the Delaware Secretary of State by a Delaware corporation must include the postal code of its registered office (along with the other information required by Section 131(c)).

Execution, acknowledgment, filing, recording and effective date of original certificate of incorporation and other instruments; exceptions [§ 103].—In a change related to new Section 131(c), the amendments added a new Section 103(j), which provides that a corporation with a certificate of incorporation on file with the Delaware Secretary of State before August 1, 2011 does not need to amend its certificate to add the postal code of its registered office. However, if any pre-August 1, 2011 corporations change the address of their registered office in the future, the changed address must include the registered office's postal code.³

DIRECTORS AND OFFICERS

Indemnification of officers, directors, employees and agents; insurance [§ 145].—The 2011 amendments clarified how the "vested rights" provision of

3. Also, if a pre-August 1, 2011 corporation or its registered agent filed a change of address of the registered office before August 1st under Section 133 or 134, those documents also do not need to be amended unless there is a subsequent change of address on or after August 1st.

Section 145(f) operates with respect to indemnification and advancement of expenses for directors, officers, employees and agents. In 2009, Section 145(f) was amended to specify a default rule for when indemnification and advancement rights set forth in a certificate of incorporation or bylaw provision vest (i.e., when those rights cannot be taken away by subsequent amendments to the certificate of incorporation or bylaws). Under the Section 145(f) default rule enacted in 2009, if an indemnitee takes action or fails to take action at a time when the certificate of incorporation or bylaws provide the indemnitee rights to indemnification or advancement, later amendments to that specific certificate or bylaw provision will not divest the indemnitee of his or her rights with respect to proceedings involving that act or omission. The 2011 amendment to Section 145(f) clarified that no later amendment to *any* provision of the certificate of incorporation or bylaws can divest an indemnitee of his or her rights to indemnification or advancement. For example, the vested rights provided under a bylaw cannot be divested by a later amendment to the certificate of incorporation that purports to deny or prohibit indemnification or advancement.

Section 145(f) continues to permit a corporation to opt out of the vested rights default rule, but if a certificate or bylaw provision provides for indemnification or advancement rights before the opt out is adopted, then the opt out will only apply prospectively to acts or omissions that occur after the opt out language is adopted.

MERGER, CONSOLIDATION OR CONVERSION

Conversion of other entities to a domestic corporation [§ 265].—Section 265 permits foreign corporations and certain non-corporate entities and associations to convert to a corporation. Conversion requires the filing of two documents with the Delaware Secretary of State: (i) a certificate of conversion (which includes certain information about the entity or association converting to a corporation) and (ii) the certificate of incorporation for the corporation into which the entity or association is converted. The 2011 amendments added a new sentence to Section 265(b) clarifying that the certificate of conversion and certificate of incorporation must be filed simultaneously with the Delaware Secretary of State. Also, if these documents are to become effective at a future time after filing,⁴ both documents must provide that they will become effective at the same time. These new provisions codified a practice of the Delaware Secretary of State that required simultaneous filing and effectiveness of these documents.

SALE OF ASSETS, DISSOLUTION AND WINDING UP

Payment of franchise taxes before dissolution, merger, transfer or conversion [§ 277].—Amended Section 277 clarifies that, before a corporation dissolves, merges or converts into another entity or transfers to another jurisdiction without continuing its existence in Delaware, it must pay all Delaware franchise taxes due through the entire calendar month in which such transaction occurs and must have filed with the Delaware Secretary of State all annual franchise tax reports, including a franchise tax report for

4. Section 103(d) permits a corporation to file an instrument with the Delaware Secretary of State that is effective at a future date or time, so long as the future effective date or time is within 90 days of the filing date.

the year in which such transaction occurs.⁵ Prior to this amendment, Section 277 did not expressly cover the payment of final franchise taxes for conversions or transfers and did not refer to filing franchise tax reports as an express condition to effecting any of the transactions covered by the statute. These changes also codify the existing practices of the Delaware Secretary of State.

Amended Section 277 also includes a new proviso which states that, notwithstanding the requirement to pay franchise taxes and file the franchise tax reports, if the Delaware Secretary of State certifies that an instrument to effect a dissolution, merger, conversion or transfer has been filed with the Delaware Secretary of State's office, then such transaction will be effective when that instrument becomes effective. Under the scheme contemplated by Section 277, the Delaware Secretary of State will not accept filings to effect one of these transactions unless the franchise taxes have already been paid and the franchise tax reports have already been filed. Upon acceptance for filing by the Delaware Secretary of State, however, these transactions will become effective in accordance with the filed documents. Practitioners should be mindful of these requirements when a transaction involves the termination of a corporation's existence in Delaware, and should allow for the necessary lead time to take care of these administrative issues before making a filing with the Delaware Secretary of State.

FOREIGN CORPORATIONS

Annual report [§ 374].—Through an added cross-reference to new Section 131(c), Section 374 was amended to require that the annual report filed with the Delaware Secretary of State by a foreign corporation doing business in Delaware must include the postal code in the address of its registered office in Delaware (in addition to the pre-2011 requirements to disclose the street, number, city and county of the registered office).

MISCELLANEOUS PROVISIONS

Corporations using "trust" in name, advertisements and otherwise; restrictions; violations and penalties; exceptions [§ 395].—Before the 2011 amendments, Section 395 prohibited a corporation from including the word "trust" in its name unless the corporation was subject to certain Delaware state or federal banking laws and regulations. Section 395 was amended to allow a corporation that is not subject to any of these banking laws and regulations to use the word "trust" in its name if the Director of the Division of Corporations at the Delaware Secretary of State's office and the Delaware State Bank Commissioner determine that the corporation's name clearly (i) does not refer to a trust business, (ii) is not likely to mislead the public into believing that the corporation's activities are supervised under any of the banking laws or regulations identified in Section 395 and (iii) will not otherwise lead to a pattern and practice of abuse that might cause harm to the interest of the public or Delaware. The 2011 amendments also updated certain statutory references to the federal Savings and Loan Holding Company Act, which was moved to Section 10 of the Home Owners' Loan Act.

5. Except for these special requirements for a corporation's last franchise tax report before dissolution, merger, conversion or transfer, Delaware corporations file annual franchise tax reports under Section 502 on or before March 1st of each year.

DOMESTICATION AND TRANSFER

Domestication of non-United States entities [§ 388].—Section 388 permits a non-United States entity to become incorporated in Delaware by filing with the Delaware Secretary of State a certificate of domestication (which includes certain information about the entity that wishes to incorporate in Delaware) and a certificate of incorporation. Similar to the amendments to the conversion provisions of Section 265, the amendments to Section 388 clarified that these two documents must be filed simultaneously with the Delaware Secretary of State, and, if these documents become effective at a future time, each document must provide for the same future effective time. These new provisions codify the existing practice of the Delaware Secretary of State for filing a domestication.

CORPORATION FRANCHISE TAX

Corporations subject to and exempt from taxation [§ 501].—Section 501 is the baseline provision that obligates a Delaware corporation to pay franchise taxes and provides tax exemptions for certain types of corporations. Section 501 was amended to clarify that captive insurance companies licensed under Chapter 69 of Title 18 of the Delaware Code are not required to pay annual franchise taxes. Another amendment to Section 501 also clarified that corporations organized for certain charitable, educational and religious purposes are “exempt corporations” that are not required to pay franchise taxes.⁶

6. In related changes, Sections 313 and 391 were also amended to conform their respective provisions with the “exempt corporation” provisions of Section 501. Section 313 relates to renewing certain tax-exempt corporations after they have become void for failure to file the franchise tax reports necessary to claim a tax exemption. Section 391 provides that these tax exempt corporations do not need to pay fees for certain filings with the Delaware Secretary of State.

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